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No. 86-761 (4)

In The

Supreme Court of the United States

October Term, 1987

CYNTHIA A. FORRESTER,

Petitioner,

v.

JUDGE HOWARD LEE WHITE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE and BRIEF OF AMICUS CURIAE, ILLINOIS JUDGES ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Illinois Judges Association (hereinafter the Association), respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of respondent, Judge White, that the decision below be affirmed. Consent to file this brief has been sought from the parties and granted by respondent, but counsel for petitioner has refused to consent. The Association therefore requests leave of this Court to file the accompanying brief, pursuant to Rule 36.3.

The Illinois Judges Association is a not for profit organization established in December, 1971. Its present membership consists of approximately 750 active and retired state court judges. The Association was formed to promote the common interests of its members in improving the judiciary, the administration of justice, and the confidence of the public therein. To that end, the Association has filed briefs *amicus curiae* in other cases impacting on the judiciary.

The specific purposes of the Association are: a) to create a liaison between the judges of the State of Illinois; b) to encourage continuing legal education; c) to resolve common problems; d) to encourage the highest level of performance from its individual members; e) to foster public confidence in the judiciary; f) to improve efficiency in the administration of justice; and g) to bring the people of the State of Illinois a court system of the highest standards.

This case is of substantial importance to the Association because of the adverse effect that erosion of the doctrine of judicial immunity would have on the administration of the judiciary and on the ability of the judiciary to attract and keep high quality jurists. The Association has concluded that operation of the court sys-

tem and the independence of the judiciary would suffer if the decision of the court below were reversed.

The Association believes the accompanying brief will be of assistance to this Court because the Association is intimately familiar with the judiciary in Illinois and particularly the rules governing judicial misconduct and the sanctions available for their breach.

The Illinois Judges Association therefore moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

July 24, 1987

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Subscribed and sworn to before me
this 24th day of July, 1987.
My Commission expires 10/4/88

Notary Public

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ON WRIT OF CERTIORARI TO THE
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BRIEF OF ILLINOIS JUDGES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

Pursuant to Rule 36 of the Rules of this Court, the Illinois Judges Association respectfully submits this brief as *amicus curiae* in support of the Respondent.

INTEREST OF ILLINOIS JUDGES ASSOCIATION

The interests of the Illinois Judges Association in this matter are set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

The Association urges this Honorable Court to affirm the ruling of the court below. The Seventh Circuit correctly held that the probation officer's duties are intimately related to the functioning of the judicial process in Illinois and thus within the scope of judicial immunity. The decision does not expand judicial immunity, but is consistent with its purpose - to allow the judiciary to function without fear of civil damage actions for judicial acts. Because of the statutory obligations imposed on a judge and a probation officer in Illinois, employment decisions relative to probation officers are an integral part of the judge's duties in the performance of his judicial acts.

Moreover, the affirmance of the court below will not shield judges from any sanctions for judicial misconduct. Even if plaintiff's compensatory remedies are limited by judicial immunity, the judge's behavior can be effectively controlled by judicial discipline and removal from office.

Finally, the doctrine of judicial immunity is vitally important. Judges, personally and professionally, are scrutinized daily by the public and the press. In order to keep high caliber jurists on the bench, to ensure an efficient and independent judiciary, and to attract high quality lawyers to the bench, the doctrine of judicial immunity must protect the judiciary from monetary damages for judicial acts.

ARGUMENT

I. THE SEVENTH CIRCUIT DID NOT EXPAND THE SCOPE OF ABSOLUTE JUDICIAL IMMUNITY TO SHIELD A JUDGE'S PERSONNEL DECISIONS BUT PROPERLY APPLIED THE LAW TO FIND THAT THE DISCHARGE OF THE PROBATION OFFICER IN THIS CASE WAS A JUDICIAL ACT.

In its decision in this case, the Court of Appeals properly found that the duties of the plaintiff probation

officer were intimately related to the function of the judicial process in Illinois. Thus, Judge White's decision to demote and fire plaintiff were judicial acts performed within the scope of his authority. The Seventh Circuit did not expand the scope of absolute immunity or leave the scope uncertain, but instead furthered the objective of the doctrine.

In Illinois, the chief judge of each circuit appoints a director of the probation department in the circuit pursuant to statute. Ill. Rev. Stat. (1979), ch. 38, sec. 204-1; Ill. Rev. Stat. (1979) ch. 37, sec. 706-5(1). The statutes charge the judge not only with hiring the director, but also with determining when other probation personnel are needed. The duties of the probation officer are similarly prescribed by statute. Ill. Rev. Stat. (1979), ch. 38, sec. 204-4; Ill. Rev. Stat. (1979), ch. 37, sec. 706-1.

The judge depends on the probation officer for three main purposes: preparation of presentence reports in all felony cases; monitoring adult probationers; and filing petitions for revocation of probation as necessary. As the Court of Appeals correctly noted: "Decisions regarding, for example, sentencing, probation, and the revocation of parole and probation are unquestionably judicial acts, and the plaintiff provided crucial advice and information necessary to making those decisions." *Forrester v. White*, 792 F.2d 647, 657 (7th Cir. 1986), *cert. granted* 107 S.Ct. 1282 (1987).

Because the judge is accountable to the public for the conduct of individuals to whom he grants probation, a judge must have complete confidence in the probation officer upon whose opinion the probation decision is heavily based. Few other court employees have a quasi-judicial function - neither bailiffs, sheriffs, clerks nor court reporters have the statutory authority to investigate and make recommendations for the disposition of cases before the court. In fact, the liberty of a person on probation is for

all practical purposes in the hands of the probation officer.

The Seventh Circuit's opinion in the case at bar recognizes this distinction between probation officers and other court personnel, noting, for example, that a court reporter or bailiff is not usually required to provide a judge with information and advice regarding the substance of litigation pending before the court. 792 F.2d at 656, fn. 9. This recognition aided the Court in deciding, under the analysis of *Stump v. Sparkman*, 435 U.S. 349 (1978), that the dismissal of the plaintiff probation officer was a function normally performed by a judge in Illinois and that the probation officer was dealing with the judge in his official capacity. 792 F.2d at 656, 657.

Contrary to Judge Posner's dissenting view, the Seventh Circuit's analysis does not leave the scope of the doctrine of judicial immunity uncertain. Instead, the opinion sets out a practical standard for determining what judicial decisions can be fairly characterized as judicial acts. The opinion does not, as plaintiff would lead this Court to believe, expand the scope of absolute judicial immunity to all personnel or employment related decisions made by judges. In fact, the decision puts judges on notice that most personnel related decisions will not be accorded the protection of judicial immunity. 792 F.2d at 656, fn.9.

Affirmance of the decision below would serve a dual purpose. First, affirmance will enable a judge to work only with probation officers in whom he has total trust since he will be able to discharge an officer in whom he has lost confidence without fear of litigation resulting in money damages. Thus the judge would carry out his judicial functions efficiently and independently.

Second, the public would be served by affirmance. Individuals who commit crimes while on probation are a detriment to society. An effective working relationship between a judge and his probation officer is critical to the process of evaluating the appropriateness of probation in

each case. Further, the breakdown of the relationship between a judge and his probation officer could also adversely affect individuals who should receive probation but do not because the judge does not trust the favorable report received from an officer in whom he has lost confidence. Finally, the public is also served by a system in which judges are free to exercise independent judgment without fear of suits for monetary damages.

Since the decision below correctly recognizes that probation officers in Illinois are an intregal part of the judicial process and the purpose of the judicial immunity doctrine is furthered by this finding, the Court of Appeals should be affirmed.

II. EFFECTIVE SANCTIONS ALREADY EXIST FOR JUDICIAL MISCONDUCT.

The Association does not condone discrimination in any form. There are effective sanctions, however, for those instances of judicial misconduct which occur, even if plaintiff's compensatory remedies are limited by judicial immunity. Judicial discipline and removal from office are viable alternatives available in Illinois.

Judges in some instances are subject to criminal liability. As stated in *Imbler v. Pachtman*:

> Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. Sec. 242, the criminal analog of Sec. 1983.

424 U.S. 409, 429 (1976). *Accord, Pulliam v. Allen*, 466 U.S. 522, 540-541 (1984).

Judges who engage in misconduct are also subject to removal from office by impeachment, (Ill. Const., art. IV, sec. 13), defeat at election, or judicial action. Illinois judges are elected, and sitting judges may be retained only upon receiving sixty percent of the vote. Ill. Const. art. VI, sec. 12(d). Removal at the ballot box in Illinois is an increas-

ingly common occurrence as bar associations and the media have stepped up their efforts to inform the electorate about the merits of judicial candidates. The remedy of defeat at the polls should not be lightly dismissed.

Illinois, like most states, has an administrative procedure for judicial discipline. Article VI, Section 15 of the Illinois Constitution creates two entities to review judge's acts: the Judicial Inquiry Board and the Courts Commission.

Illinois' Judicial Inquiry Board receives, investigates, and files complaints regarding judges with the Courts Commission. The Board may file a complaint to charge the judge with willful misconduct in office, persistent failure to perform his duties, other conduct that is prejudicial to the administration of justice, conduct that brings the judicial office into disrepute, or physical or mental incapacity to perform his duties. Ill. Const. art. VI, sec. 15(c).

Illinois' Courts Commission hears complaints filed by the Judicial Inquiry Board. The Commission can remove a judge from office, suspend him without pay, censure, reprimand or retire a judge for misconduct or incapacity. Ill. Const. art. VI, sec. 15(f).

As required by Article VI, Section 13(a) of the Illinois Constitution, the Illinois Supreme Court has adopted rules governing judicial conduct. Violation of these rules is grounds for judicial discipline. Illinois Supreme Court Rule 71 (1987); former Illinois Supreme Court Rule 62 (repealed 1987); *People ex rel. Harrod v. Illinois Courts Commission*, 69 Ill.2d 445, 470, 372 N.E.2d 52 (1977).[1]

In sum, there are sufficient alternative sanctions available to deter misconduct on the part of the judges. The consequences of removal go beyond losing judicial office

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[1] At the time of the events in this case, Illinois judges were governed by the standards of judicial conduct in Illinois Supreme

(Footnote continued on the following page)

and may deprive a judge from returning to the practice of law or losing his retirement benefits. Absolute immunity from civil damages does not shield judges from sanctions for misconduct.

The decision of the Court of Appeals should be affirmed.

III. THE DOCTRINE OF ABSOLUTE JUDICIAL IMMUNITY FROM EMPLOYMENT DECISIONS RELATING TO PROBATION OFFICERS IN ILLINOIS IS VITALLY IMPORTANT TO ENSURE AN EFFECTIVE AND INDEPENDENT JUDICIARY AND TO ATTRACT AND KEEP HIGH CALIBER JURISTS.

As already discussed in this brief, the duties of a probation officer in Illinois are intimately related to the administration of justice. A reversal of the court below would "chill" independent decision-making and harm the effectiveness of the judiciary. Furthermore, an adverse decision would tend to discourage high quality lawyers from seeking judicial office and drive able jurists into premature retirement.

The court system today is a complex institution. A judge faces an array of issues concerning his personal and professional conduct, issues which do not arise in the private practice of law. Judicial ethics, which universally forbid the "appearance of impropriety," impact, for example, on a judge's campaign conduct in a retention election, his honorary memberships, receipt of honorary awards, participation in charitable endeavors, financial

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1 *(Continued)*

Court Rules 61 through 71. As of January 1, 1987, these Illinois Supreme Court Rules were replaced by standards that follow the ABA Canons of Judicial Conduct. These new standards are substantially similar to the earlier standards. Committee Commentary, p.7, Smith-Hurd Illinois Annotated Statutes, 1987 pocket part.

disclosure, participation in public debate, and recusal in certain cases.[2]

The erosion of absolute judicial immunity may affect a judge's ability to effectively control his docket and courtroom. A judge may hesitate to make decisions relating to quasi-judicial officers because his reasons may be misconstrued and used against him in lawsuits for monetary damages. These concerns can be assuaged by affirmance of the court below and a commitment from this Court that further erosion of the doctrine of absolute judicial immunity will not be forthcoming.

Judicial concern over recent developments in the immunity doctrine is well founded.[3] Already liable for attorney's fees under Section 1988 (Title 42 U.S.C. Sec. 1988), reversal of the court below would saddle judges, who face increasingly large dockets and receive relatively little compensation, with yet one more reason to leave the bench. The Association fears that this added burden will increase the flight of capable jurists back to private practice.

The Association urges this Court to affirm the opinion of the Seventh Circuit to ensure a high quality and independent judiciary.

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[2] *See*, Gray, *Ethical Conduct in a Judicial Campaign and is Campaigning an Unethical Activity?*, 57 Wash. L.R. 119 (Dec. 1981); Carlisle, *Honorary Memberships May Exploit Judicial Position*, 58 Fla. Bar J. 99 (Feb. 1984); Honig, *Judges Given Guidance on Extrajudicial Activities*, 117 N.J.L.J. 1, (Mar.20, 1986); Middleton, *Hunger and Ethics: No Conflict in Judge's Case*, 69 ABA J. 573 (May 1983); Hager, *Judges, Once Politicians, Face Recusal Problems*, Legal Times of Washington, September 9, 1984 at p. 24.

[3] Roth and Hagan, *The Judicial Immunity Doctrine: Between the Bench and a Hard Place*, 35 Juv. and Fam. Ct. J. 3, (Fall 1984); Plotkin and Mazorol, *Judicial Malpractice: Pulliam is not the Answer*, Trial (Dec. 1984) at 24.

CONCLUSION

The Illinois Judges Association was organized to improve the judiciary, the administration of justice and the confidence of the public in the judiciary. Assisting judges in understanding their ethical obligations and conforming to those obligations is a major purpose of the Association. Interpreting court decisions impacting on judges *qua* judges is another. The importance of this decision cannot be understated. If this Court affirms the lower court, the judge in Illinois will know that his decision to hire and fire probation officers will not be the subject of a suit for monetary damages. The opinion of the court below means nothing more than that. In fact the decision sounds a warning that a judge's decisions relative to other court personnel are probably not protected by the doctrine of judicial immunity.

The Association urges affirmance of the Seventh Circuit's opinion. The decisions of this Court and the necessities of judicial administration show that judicial immunity must be extended to employment decisions of quasi-judicial officers, such as the probation officer in this case. Judges do not need judicial immunity regarding employment decisions for all court personnel, and the opinion below does not expand the scope of the doctrine to cover all such decisions. In order to keep an independent and effective judiciary, the court of appeals should be upheld.

Respectfully submitted,

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